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In the closing days of the battle of the Argonne, Captain Reuben B. Hutchcraft, Jr., 106th Infantry, was killed in action. He was leading a reconnaissance patrol, and, encountering a machine-gun fire from which the character of the terrain afforded no adequate protection for his men, he led them in a successful charge on the machine-gun nests which were put out of action. He himself, however, was killed. Captain Hutchcraft graduated from the University of Kentucky in 1907, and received the degree of LL.B. *cum laude* from Harvard in 1911. From 1909 until 1911 he was an editor of this REVIEW. After his graduation from the law school, he practiced law in Kentucky, his native state. He was twice elected to the Kentucky legislature, and was a member of the state Tax Commission, and a professor in the law school of the University of Kentucky. With his intellectual ability, his enthusiasm, his devotion to the public welfare, and his engaging personality he was a man who could ill be spared by his commonwealth and his country.

FORGERY OF AN INTERSTATE BILL OF LADING AS A FEDERAL CRIME. — By the Pomerene Act approved in August, 1916, Congress undertook to regulate the effect of interstate bills of lading.

That this statute in its main provisions is constitutional is hardly open to doubt, since the decision of *Atchison, Topeka & Santa Fé R. R.* v. *Harold.*[1] This case held a Kansas statute unconstitutional which provided that the innocent holder of the bill of lading should be vested with rights not available to the shipper. Not only the provisions of the

[1] 241 U. S. 371 (1916).

Pomerene Act, which relate directly to the contract between the shipper and the carrier are thus governed by federal law, but those which relate to the transfer of the bill of lading between third parties, if for no other reason than because the rights of the transferee necessarily affect the obligation of the carrier. If the purchaser of the bill of lading acquires an indefeasible title to the goods, the carrier must recognize that title, and will be liable in damages if he fails to do so.

In *United States* v. *Ferger*,[2] however, it has recently been held that section 41 of the Pomerene Act, which makes criminal the forging of an interstate bill of lading, is unconstitutional, "since the forged bills of lading were nothing but pieces of paper fraudulently inscribed. . . . They were not receipts for goods. . . . They did not affect interstate commerce."

The court excluded from contemplation, as possibly presenting a different question, the counterfeiting of an existing genuine interstate bill of lading.

An argument of this character is applicable not alone to forged bills of lading, but to any case where Congress seeks to punish a simulation of a lawful means or agency for promoting a constitutional object. The court refers in its opinion to the counterfeiting of money of the United States, and distinguishes the admitted power of Congress to punish counterfeiting money from the asserted power to punish counterfeiting bills of lading on the ground that the Constitution itself gives power to Congress "to provide for the punishment of counterfeiting the securities and current coin of the United States."

This express statement in the Constitution certainly does deprive the illustration of counterfeit money of value as an argument; but Congress has undertaken to punish not only counterfeiting its own money and securities, but those of foreign countries, and this legislation has been held constitutional,[3] though no direct authority is given in the Constitution similar to that regarding domestic money and securities. The Supreme Court did, indeed, in reaching its conclusion, rely mainly on the provision in the Constitution which gives Congress power to punish offenses against the law of nations, but also relied on the power of Congress to regulate commerce with foreign nations; and the fact that the forging of foreign securities might be a subject of foreign commerce was held a reason for protecting such commerce by punishing the forgery.

Another statute, also held constitutional,[4] shows the power of the government to punish simulation of what has been put under the protection of the national government. It has been enacted by Congress:[5] "Whoever, with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States . . . shall be fined," etc. It will be observed that this provision punishes the fraudulent demanding or obtaining from "any person" any money, paper, etc.; and this provision has been sustained by the Supreme Court, though the guilty defendant purported to hold an office under the United States which

[2] So. Dist. Ohio, October, 1918.
[3] United States *v.* Aijoua, 120 U. S. 479 (1887).
[4] United States *v.* Barnow, 239 U. S. 74 (1915).
[5] COMP. STATS. § 10196 (1913).

had no actual existence, and was engaged in an activity properly exercised by no officer of the United States.

The analogy between this case and the case concerning bills of lading is close. Congress doubtless has power to appoint officers to carry out the functions of government. Similarly it has power to regulate interstate commerce. It is not expressly given power to punish persons who are neither officers of the United States nor attempt to exercise the powers of real officers, any more than it is expressly given power to punish persons who simulate the methods of interstate commerce without actually engaging in such commerce. But because the respect and authority of its officers cannot be maintained without punishing those who simulate them, a statute was upheld which authorized the prosecution of one fraudulently assuming to be such an officer, whether the office or the powers he purported to have were or could be held by any one. By a parity of reasoning, one who interferes with the legitimate transaction of interstate commerce by simulated documents may be punished in order that the legitimate instrumentalities of commerce may not fall into disrepute and fail to achieve their proper effect.

The inference justified by these decisions is borne out by the general attitude of the Supreme Court towards the question of interstate commerce. "'Commerce among the several states' is a practical conception";[6] and the Supreme Court has indicated abundantly its determination to prevent anything and everything which practically impedes and interferes with interstate commerce. It has refused to permit interference with the physical operation of the ordinary channels of interstate commerce. A state was not allowed to stop the operation of telegraph lines by injunction for failure to pay taxes.[7] Nor was a state court allowed to order the removal of a railroad bridge which formed part of a direct channel of interstate commerce.[8]

"The freedom from interference on the part of the States is not confined to a simple prohibition of laws impairing it, but extends to interference by any ultimate organ." [9] "The state can do nothing which will directly burden or impede the interstate traffic of the company, or impair the usefulness of its facilities for such traffic." [10] Nor are individuals allowed any greater freedom than the agencies of the state in interrupting interstate commerce.[11]

In *In re Debs*,[12] the United States, finding that the interstate transportation of persons and property, as well as the carriage of the mails, was forcibly obstructed, and that a combination and conspiracy existed to subject the control of such transportation to the will of the

[6] Reanich *v.* Pennsylvania, 203 U. S. 507, 512 (1906).

[7] Western Union *v.* Attorney-General, 125 U. S. 530 (1888). See Williams *v.* Talladega, 226 U. S. 404, 415 (1912).

[8] Kansas City Southern Ry. Co. *v.* Kaw Valley Drainage District, 233 U. S. 75 (1914).

[9] *Ibid.*, 78.

[10] *Ibid.*, 79.

[11] Houston & Texas Railway *v.* United States, 34 U. S. 342 (1914). In the course of its opinion the court said, page 351, "Congress is empowered to regulate, that is, to provide the law for the government of interstate commerce; to enact 'all appropriate legislation' for its 'protection and advancement' (The Daniel Ball, 10 Wall. 557, 564); to adopt measures 'to promote its growth and insure its safety' (County of Mobile *v.* Kimball, 102 U. S. 651); 'to foster, protect, control and restrain' (Second Employers' Liability Cases, 223 U. S. 1)."

[12] 158 U. S. 564 (1895).

conspirators, applied to one of their courts, sitting as a court of equity, for an injunction to restrain such obstruction and prevent carrying into effect such conspiracy. The injunction was granted.

The same power which can thus protect from physical interference the ordinary means of interstate transportation does not become powerless when the method of obstruction is less tangible though equally effective. Tax laws,[13] inspection laws,[14] and laws of other kinds [15] have been held unconstitutional whenever their operation has been such as to cast a direct burden upon interstate commerce.

It can hardly be contested that the effect of forged interstate bills of lading is to discredit and render hazardous the use of genuine interstate bills; or that the section of the statute in question is aimed to protect the business of dealing in genuine interstate bills. This can be its only purpose, and its provisions are calculated to effect that purpose. There is here no question of attempting to use the constitutional power to regulate commerce for an indirect object. The power is invoked only to protect business which it is a function of the national government to protect.

THE EFFECT OF REFERENCES IN A BILL OF EXCHANGE TO SHIPPING DOCUMENTS OR GOODS. — "The enormous volume of sales of produce by a vendor in one country to a purchaser in another has led to the creation of an equally great financial system intervening between vendor and purchaser, and designed to enable commercial transactions to be carried out with the greatest money convenience to both parties." [1] The vendor draws a bill of exchange and sells it, with the order bill of lading and insurance papers for the goods attached, to a bank or exchange house, thus getting his money immediately after shipment. Sometimes the draft is drawn on the purchaser, but where it is payable on time the exchange house is often unwilling to part with the collateral in return for an acceptance by a mercantile house, and it is common for the purchaser to arrange that a bank of high standing shall be drawee and accept the draft. On acceptance the shipping documents are surrendered to the acceptor, and the purchaser can make immediate sale of the goods so as to secure funds to pay the draft at maturity.

Bills of exchange secured in this way usually bear some reference to the attached documents or to the goods. It is convenient for all parties to be able to identify the bill as relating to a particular transaction and check the documents of title accordingly. Even after acceptance,

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[13] See Crenshaw *v.* Arkansas, 227 U. S. 389 (1913); Stockard *v.* Morgan, 185 U. S. 27 (1902), and cases cited therein.

[14] Brimmer *v.* Rebman, 138 U. S. 78 (1891); Minnesota *v.* Barber, 136 U. S. 313 (1890).

[15] International Paper Co. *v.* Massachusetts, 246 U. S. 135 (1918) (taxation on par value of the capital stock of a foreign corporation); Darnell *v.* Memphis, 208 U. S. 113 (1909) (a law exempting from taxation growing crops and articles manufactured from the produce of the state); Buck Stove, etc. Co. *v.* Vickers, 226 U. S. 205 (1912) (a law requiring certain statements from foreign corporations).

[1] Scrutton, L. J., in Guaranty *v.* Hannay, [1918] 2 K. B. 623, 659, gives an excellent description of the system.